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No. 88-1877

In the Supreme Court of the United States

OCTOBER TERM, 1989

RAMON DEAN, PETITIONER

v.

MICHAEL P. STONE, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's findings that the Army's failure to hire petitioner for certain jobs was not the result of racial discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15) is unpublished, but the decision is noted at 866 F.2d 1423 (Table). The opinion of the district court (Pet. App. 16-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1989. A petition for rehearing was denied on February 9, 1989. Pet. App. 14. The peti-

tion for a writ of certiorari was filed on May 10, 1989. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, petitioner, who is white, was an Army electronics technician at Fort Rucker, Alabama. His position, classified at the GS-9 level, held no potential for further promotion. He had previously worked at the GS-11 level, however, and that experience qualified him for employment at the GS-12 level if he could find a GS-12 position. During 1983 and 1984, several positions became available at Fort Rucker that might have led to a GS-12 promotion for petitioner, but the Army did not select petitioner for any of them. Pet. App. 16.

Petitioner first applied for an equipment specialist's position in 1983. Originally classified at the GS-12 level, the position had been reclassified to level GS-5. The Army's purpose in doing so was to increase minority representation in the upper levels of the civil service by providing for lower level internships that would prepare the incumbents to compete for higher level jobs. The equipment specialist position was defined so that, although entry would be at the GS-5 level, noncompetitive promotions would be available up to GS-9, the "target grade" for the job. Beyond that level, promotion would be available to GS-11 or GS-12, but only on a competitive basis. It was generally understood that on-the-job experience would give the incumbent a slight advantage over other applicants. Pet. App. 17.

Because advancement to the GS-12 level was ultimately possible, several white employees at the GS-9 level, including petitioner, asked to be considered for the GS-5 equipment specialist position, but their

names were not referred to the commanding officer. The Army explained that the GS-9 applicants were not eligible for the position at that time because the job did not offer them the potential for non-competitive promotion: GS-9 was the maximum non-competitive promotion level of the job, and the applicants were already at that level.[1] Petitioner was informed, however, that he would be allowed to compete for the position if it was opened up for competitive promotion to the GS-11 or GS-12 level. Pet. App. 17. Ultimately, a black civil servant was chosen for the equipment specialist position, although he was less qualified than petitioner. *Id.* at 17-18.[2]

Petitioner also applied for another GS-12 equipment specialist position, one whose grade level had not been reduced. Petitioner's name was initially placed on the list of names being referred to the commanding officer, but the list was returned because the applicants on the list were found to have insufficiently impressive qualifications. A new referral list was prepared, and the job was filled by a white applicant whose qualifications were superior to those of petitioner. Pet. App. 18.

Petitioner applied for two other GS-12 equipment specialist positions as well. He has admitted that the Army properly rejected him for one of those posi-

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[1] In addition, petitioner failed to follow proper procedures for requesting what for him would have been a lateral transfer or demotion. Pet. App. 17.

[2] The selected person's application was received after the closing date specified by the job opportunity announcement. Pet. App. 17-18. But the district court subsequently found that the closing date did not apply to one non-racially identified group of applicants, of which the selected individual was a member. *Id.* at 20.

tions. Pet. App. 18. With respect to the other, one referral list included petitioner's name, but all of the listed applicants were rejected for insufficient qualifications. Although petitioner's name appeared on another referral list, a black individual, who was better qualified than petitioner, was selected. *Ibid.*

2. Petitioner subsequently brought suit in the Middle District of Alabama, claiming that the Army impermissibly denied him the promotions in question because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* After trial, the district court rejected the claim. The court concluded that petitioner had not shown that he was the victim of discrimination, explaining that the Army had "articulated legitimate, non-discriminatory reasons for not selecting [petitioner]," and petitioner "has not shown these reasons to be a pretext for race discrimination." Pet. App. 19.

With respect to the equipment specialist position that had been reclassified as a GS-5 position, the court first found that the reclassification, which was carried out pursuant to a consent decree designed to promote affirmative action, was lawful. Pet. App. 20. The court then found that the decision not to refer petitioner for selection for the position was not racially motivated. The court found that all applicants were judged without regard to race if they were eligible for the job and that the eligibility criterion that excluded petitioner—that the GS-5 position must have non-competitive promotion potential (up to the GS-9 target grade) for any applicant, thus excluding applicants already employed at GS-9 or above (*id.* at 17)—was not racially motivated. *Id.* at 20-21. The court also found that any such excluded applicant could apply for the position when it opened up for

competition above the GS-9 level and that, although incumbents would have a slight advantage over outside competitors, the Army intended that the competition would be equal. *Id.* at 17, 21.

The district court similarly rejected petitioner's challenge to the Army's refusal to select him for the two other positions that petitioner continued to place at issue. The court found that each was filled by an individual who was better qualified than petitioner. The court also concluded that petitioner had not shown that the selection in either case was a pretext for race discrimination. Pet. App. 22-23.

3. The court of appeals affirmed. The court stated simply that the district court's findings of fact were not clearly erroneous and that its rulings of law did not contain reversible error. Pet. App. 15.

ARGUMENT

The court of appeals' decision affirming the district court's rejection of petitioner's discrimination claim does not warrant this Court's review. The decision is entirely factbound. It does not conflict with any decision of this Court or of any other court. And petitioner's challenge to the correctness of the decision is without merit.

The district court correctly rejected petitioner's discrimination claim with respect to the two GS-12 jobs for two simple reasons. One was filled by a white person; as to that position, petitioner did not even establish a prima facie case of race discrimination against him. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). Moreover, for both positions, the Army selected persons

other than petitioner because they were better qualified than petitioner.[3] As the district court found, petitioner failed to establish that the Army's reliance on such superior qualifications in making its selections was a pretext for discrimination. Pet. App. 22-23.

With respect to the position that was reclassified at the GS-5 level, the district court correctly found that the Army's decision not to select petitioner likewise was not unlawfully discriminatory. Both white and black persons were in the group of persons who met the criteria for consideration (see DX 11), and the selection from that group was made without regard to race and on the basis of the candidates' qualifications (Pet. App. 20). And the Army's decision to reclassify the position and its adoption of the criterion that excluded petitioner from consideration—that the position must give applicants the potential for non-competitive promotion above their current level, thus excluding all persons currently classified at GS-9 or above—were themselves lawful.

The Army's reclassification and selection-criterion decisions were made in order to carry out an affirmative-action consent decree (*Matthews* v. *Alexander*, Civ. No. 76-44-S (M.D. Ala. Apr. 6, 1979)). Although the decisions were aimed at increasing black representation in the Army work force, the Army's job selection criteria were themselves race-neutral. The Army did not use race to choose among candidates. Rather, the Army simply eliminated

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[3] With respect to one of the positions, the district court explained that the person selected had more experience in avionics than petitioner. Pet. App. 23. The Army had the same basis for its selection with respect to the other position. See 2 R. 26.

from the competition persons who, because of experience, had greater qualifications than needed for the position; it thereby provided that *all* persons with less experience, but with sufficient qualifications, would have a better chance of entering the Army work force. The Army's decision not only was race-neutral in operation, but the district court found that it was not motivated by a desire to exclude whites. Pet. App. 21.[4] Indeed, while one consequence of the Army's action was to eliminate some white persons from consideration for the job, the Army's decision also enabled some other, otherwise-ineligible white persons to compete, equally, for the job. In these circumstances, the Army's action in applying the race-neutral promotion-potential criterion after reclassifying the position to the GS-5 level was consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Cf. *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706, 738 (1989) (Scalia, J., concurring in the judgment) (noting lawfulness of programs that use race-neutral means, as opposed to racial classifications, to remedy past discrimination, such as a program that gives a preference to small or new businesses in order to aid those excluded by past discrimination).

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[4] Although it was "generally understood" that, if the GS-5 position opened up for competitive promotion above the GS-9 level, incumbents would have a slight advantage (Pet. App. 17), the district court found that the Army's intent was that such competition—for which petitioner would be eligible—would be on an equal footing (*id.* at 21).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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